

**REDACTED DECISION – DK#S 11-115 P – BY – GEORGE V. PIPER  
ADMINISTRATIVE LAW JUDGE II – SUBMITTED DECISION on DECEMBER  
8, 2011 – ISSUED ON JUNE 5, 2012**

**SYNOPSIS**

**TAXATION -- PROCEDURE AND ADMINISTRATION --** It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

**PERSONAL INCOME TAX -- BURDEN OF PROOF --** In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax, interest, or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10-10(e) (West 2010); W. Va. Code R. § 121-1-63.1 (2003).

**PERSONAL INCOME TAX -- RESIDENT INDIVIDUAL --** To be a resident individual for personal income tax purposes pursuant to West Virginia Code Section 11-21-7(a), one must be an individual who is either domiciled in this State, unless he has no permanent abode in this State and has a permanent abode elsewhere and in the aggregate, spends not more than thirty days of the taxable year in this State, or is not domiciled in this State but does have a permanent place of abode in this State and spends in the aggregate more than one hundred eighty-three days of the taxable year in this State.

**PERSONAL INCOME TAX -- NONRESIDENT INDIVIDUAL --** A nonresident individual is an individual who is not a resident of the State of West Virginia. *See* W. Va. Code Ann. § 11-21-7(b) (West 2010).

**PERSONAL INCOME TAX -- NO SHOWING OF RESIDENT INDIVIDUAL --** The evidence showed that Petitioner's physical presence in the State of West Virginia during tax year 2006 was *de minimis*, in that he never lived here and never had any intention of ever making West Virginia his permanent place of abode. This finding, coupled with his showing that he had a permanent place of abode elsewhere, and did not spend in the aggregate more than thirty days of the taxable year in this State, pursuant to West Virginia Code Section 11-21-7(a)(1), or in the aggregate more than one hundred eighty-three days of the taxable year in this State pursuant to West Virginia Code Section 11-21-7(a)(2), means that he does not fit the definition of resident individual in West Virginia Code Section 11-21-7(a), but does fit the definition of a nonresident individual in West Virginia Code Section 11-21-7(b).

**PERSONAL INCOME TAX -- BURDEN OF PROOF MET --** The Petitioner did carry his burden of proof and established that the assessment of personal income tax, at issue in this case, was erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. § 121-1-63.1 (2003).

## **FINAL DECISION**

On January 20, 2011, the Tax Unit of the Compliance Division (the Division) of the West Virginia State Tax Commissioner's Office (the Commissioner or the Respondent), issued an assessment for personal income tax against the Petitioner. This assessment was issued pursuant to the authorization of the State Tax Commissioner under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code. The assessment was for tax year 2006, for tax of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_, and additions to tax of \$\_\_\_\_\_, for a total assessed tax liability of \$\_\_\_\_\_. Written notice of the assessment was served on the Petitioner as required by law.

Thereafter, by fax on March 5, 2011, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code Ann. §§ 11-10A-8(1) and 11-10A-9 (West 2010).

Subsequently, a notice of hearing on the petition was sent to the parties and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10.

## **FINDINGS OF FACT**

1. Petitioner is presently an inactive, quasi-retired officer in the United States Military who, from time to time, works out of the Pentagon. Petitioner commutes between the State of Florida and the State of Virginia, in order to do consulting work in the District of Columbia. Petitioner's work assignments take him to the States of Maryland and California, and also overseas.

2. In 2006, Petitioner was employed by a Corporation, a Maryland company working on site for the EPA in Washington, D.C., and a United States Military Base in California.

3. Petitioner and his sister own real estate located in the State of West Virginia; more specifically, in a county in West Virginia. Petitioner owns equipment and vehicles located on that property and pays personal property taxes to the assessor of a West Virginia county.

4. Petitioner's sister, and her husband, reside in the house situated upon the property located in a county of West Virginia; and Petitioner's sister has been given power of attorney, by Petitioner, so that she can receive and sign for mail sent to Petitioner at that address.

5. Petitioner also owns properties, having mailing addresses, in Missouri; Florida and Virginia.

6. In 1995, Petitioner purchased property in Virginia. Petitioner resides there, in lieu of hotels or other accommodations, when working in the District of Columbia and the surrounding area. Petitioner also owns registered motor vehicles at that location.

7. Prior to 2006 and at no time since, did Petitioner reside at the West Virginia property, other than to visit his sister and her husband five or six times a year.

8. Affidavits from three neighbors who live adjacent to or in close proximity to the West Virginia property, inhabited by Petitioner's sister and her husband swear, that Petitioner has never taken up residence there, and that his occasional visits amount to nothing more than family outings, or to help mow grass and/or drop off or pick-up farm equipment.

9. Petitioner carries a West Virginia driver's license, as well as driver's licenses from the States of Virginia and Florida.<sup>1</sup>

10. Petitioner filed a Virginia nonresident tax return for tax year 2006.

11. Petitioner was neither born nor raised in West Virginia. The Petitioner has never resided in West Virginia. The only residents of the home he partially owns in the state are his sister and brother-in-law. The Petitioner has never intended to make the State of West Virginia his permanent place of abode. Additionally, he has never conducted any business in, or from, the State of West Virginia, nor does he receive any income from any West Virginia source.

### **DISCUSSION**

The sole issue for determination is whether the Petitioner was, or was not, a resident individual for West Virginia personal income tax purposes for tax year 2006.

To be a resident individual, West Virginia Code Section 11-21-7 states as follows:

(a) Resident individual. – Resident individual means an individual:

(1) Who is domiciled in this State, unless he maintains no permanent place of abode in this State, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this State, or

(2) Who is not domiciled in this State but maintains a permanent place of abode in this State and spends in the aggregate more than one hundred eighty-three days of the taxable year in this State.

(b) Nonresident individual. – A nonresident individual means an individual who is not a resident.

W. Va. Code Ann. § 11-21-7 (West 2010)

The Petitioner's un rebutted testimony was that his comings and goings in West Virginia were at all times confined to visiting his sister and her husband five or six times a year, during family outings or to mow grass or pick-up and deliver farm equipment.

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<sup>1</sup> When not working, Petitioner resides in a house located in the State of Florida.

Petitioner testified that other than co-owning the real-estate and owning some vehicles and equipment there, he had no other presence in this state. He further testified that he was not born here, raised here, did not go to school or even live here, did not conduct business in, or from, here and receives no income from West Virginia sources. He also testified that when he entered military service he did so while living in the State of Florida; that he never intended making West Virginia his permanent place of abode, in that his permanent place of abode was elsewhere. All of this testimony was bolstered by affidavits from three neighbors of his sister and brother-in-law.

Therefore, it is clear from the evidence that the Petitioner was not a resident individual under West Virginia Code Section 11-21-7(a)(1) because he maintained no permanent place of abode in this State, maintained a permanent place of abode elsewhere, and spent in the aggregate not more than thirty days of the taxable year in this State. Petitioner was also not a resident individual under West Virginia Code Section 11-21-7(a)(2) because he maintained no permanent place of abode in this State and did not spend in the aggregate more than one hundred eighty three days of the taxable year in this State.

In his brief, the Respondent never mentions, let alone argues, the import of West Virginia Code Section 11-21-7, despite the fact it is the only applicable statute to determine whether one is, or is not, a resident individual, and subject to West Virginia personal income tax. The Respondent's brief, in this matter, is confined entirely to arguments regarding the Petitioner's veracity. The Respondent questions the Petitioner's veracity as a result of instances whereby the Petitioner mistakenly used the wrong address, listed a different telephone number, or used a West Virginia address to receive mail concerning which Petitioner had plausible explanations, given the scope of his job

and the number of places where he works or has worked. All of which is irrelevant to answer the question of whether the Petitioner is a resident individual, pursuant to West Virginia Code Section 11-21-7.

In his brief the Respondent also discusses how residents of Kentucky, Maryland, the District of Columbia, West Virginia and Pennsylvania are allowed certain exemptions from Virginia filing requirements if, (a) the individual is not a domiciliary or actual resident of Virginia, (b) the Virginia source income for that year is only from salaries and wages and (c) that the Virginia source income is subject to taxation by that individual's state of residence. The Respondent states that, because the Petitioner listed his West Virginia address on his 2006 Virginia nonresident tax return he has somehow cheated the State of Virginia, by taking an exemption he is not entitled to. However, the Respondent's argument, in this regard, is not borne out by the facts and is irrelevant to the question of the Petitioner's West Virginia residency. Regarding the facts, the Petitioner's 2006 W2's show no Virginia withholding occurring and the Petitioner's 2006 Virginia nonresident tax return indicates that he took a deduction from income that zeroed out his Virginia income.. Regarding the law of this matter, the Petitioner's listing of a West Virginia address on his 2006 Virginia nonresident tax return does not make him a resident individual, pursuant to West Virginia Code Section 11-21-7.

Accordingly, it is determined that Petitioner was not a resident individual as that term is defined in West Virginia Code Section 11-21-7(a), but was, in fact, a nonresident individual under West Virginia Code Section 11-21-7(b) and therefore, not liable for West Virginia personal income tax for tax year 2006.

## CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax, interest or penalty is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10-10(e) (West 2010); W. Va. Code R. § 121-1-63.1 (2003).

3. To be a resident individual for personal income tax purposes pursuant to West Virginia Code Section 11-21-7(a), one must be an individual who is either domiciled in this State, unless he has no permanent abode in this State and has a permanent abode elsewhere and in the aggregate, spends not more than thirty days of the taxable year in this State, or is not domiciled in this State but does have a permanent place of abode in this State and spends in the aggregate more than one hundred eighty-three days of the taxable year in this State.

4. A nonresident individual is an individual who is not a resident of the State of West Virginia. *See* W. Va. Code Ann. 11-21-7(b) (West 2010).

5. The evidence showed that Petitioner's physical presence in the State of West Virginia during tax year 2006 was *de minimis*, in that he never lived here and never had any intention of ever making West Virginia his permanent place of abode. This finding, coupled with his showing that he had a permanent place of abode elsewhere, and did not spend in the aggregate more than thirty days of the taxable year in this State pursuant to West Virginia Code Section 11-21-7(a)(1), or in the aggregate

more than one hundred eighty-three days of the taxable year in this State pursuant to West Virginia Code Section 11-21-7(a)(2), means that he does not fit the definition of resident individual in West Virginia Code Section 11-21-7(a), but does fit the definition of a nonresident individual in West Virginia Code Section 11-21-7(b).

6. The Petitioner did carry his burden of proof and established that the assessment of personal income tax, at issue in this case, was erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. §11-10A-10(e) (West 2010); W. Va. Code R. § 121-1-63.1 (2003).

### **DISPOSITION**

**WHEREFORE**, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the personal income tax assessment issued against Petitioner for tax year 2006, in the amount of \$\_\_\_\_\_, interest in the amount of \$\_\_\_\_\_, and additions to tax of \$\_\_\_\_\_ for a total assessed tax liability of \$\_\_\_\_\_, should be and is hereby **VACATED** and Petitioner owes no personal income tax for the tax year in question.

### **WEST VIRGINIA OFFICE OF TAX APPEALS**

By: \_\_\_\_\_  
George V. Piper  
Administrative Law Judge

\_\_\_\_\_  
Date Entered